

EXHIBIT 1

PAUL J. SMOOT, SBN 160787
 LAW OFFICES OF PAUL J. SMOOT
 1290 Howard Avenue, Suite 303
 Burlingame, California 94010
 Telephone (650) 548-0900
 Facsimile (650) 548-0901

Attorneys for Plaintiffs
 ANTHONY CARUSO & MARIA CARUSO

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA
UNLIMITED JURISDICTION

ANTHONY CARUSO, an Individual;
 MARIA CARUSO, an Individual,

Plaintiffs,

v.

FNB BANCORP, a California Corporation,
 doing business as FIRST NATIONAL BANK
 OF NORTHERN CALIFORNIA, a National
 Banking Association;
 FIRST AMERICAN TITLE INSURANCE
 COMPANY, a California Corporation;
 RANDY BURGIONI, an Individual; and
 DOES 1-10, Inclusive,

Defendants.

Case No.

**COMPLAINT FOR DAMAGES,
 REQUEST FOR TEMPORARY
 RESTRAINING ORDER &
 PRELIMINARY INJUNCTION AND
 DECLARATORY RELIEF**

I. INTRODUCTION

1. Plaintiffs Anthony Caruso and Maria Caruso obtained a loan on their home, 21670 Schillingsburg Avenue, San Jose, CA 95120, APN: 708-40-001 and 708-39-004, from from defendant FNB Bancorp dba First National Bank of Northern California by and through its defendant Randy Burgioni, their self-appointed real estate financial advisor, who placed them in multiple loans without any ability to repay the loans.
2. This is an action for rescission of an illegal and void Mortgage and Note to certain real estate. This purported mortgage and note and the actions taken by Defendant contain unfair trade practices and predatory lending practices.

- 1 3. Plaintiffs allege upon information and belief the following:
- 2 4. In prior years, predatory lending extracted billions of dollars of wealth from communities,
3 depriving homeowners of their hard-earned equity and destroying the promise of financial
4 security that is the cornerstone of homeownership. Predatory lenders target the equity, and
5 ultimately the homes, of vulnerable homeowners by extending unaffordable loans packed
6 with excessive fees and interest rates.
- 7 5. In 2010, the Dodd-Frank Act ("Act") was passed with retroactive applications. Title X of
8 the Act, known as the Consumer Financial Protection Act of 2010, creates a new Bureau
9 of Consumer Financial Protection (the "Bureau") and endows it with wide-ranging
10 authority to issue new regulations, supervise institutions, enforce consumer financial
11 services laws and regulations, analyze data from institutions through significant new data
12 collection and reporting obligations, and otherwise prevent "abusive" conduct by lenders
13 and other financial service firms. Title XIV, known as the Mortgage Reform and
14 Anti-Predatory Lending Act, prohibits or restricts many previously common mortgage
15 lending practices and limits a lender's ability to compensate loan officers and brokers. The
16 Dodd-Frank Act also expands the role of state regulators over federally chartered
17 institutions. In all, the Dodd-Frank Act will significantly limit lender practices and will
18 substantially increase the risk that lenders and other financial service providers will face
19 investigations and enforcement actions alleging discriminatory or abusive conduct
20 affecting consumers.
- 21 6. The nationwide foreclosure epidemic, caused by the bank's refusal to properly assess the
22 risk involved compounded by the steering of homeowners has resulted in nearly three
23 trillion dollars (\$3,000,000,000) of tax payer money being given to the banking industry
24 despite public outrage. Foreclosures rates have skyrocketed with more than a projected
25 double increase in foreclosure since last year, which was double the year before.
26 Communities of various socio-economic resources have been drastically cut down, the
27 landscape of vacant foreclosed homes affect 'wealthy' and 'poor' neighborhoods alike
28 posing significant health and safety concerns.

- 1 7. The authority of the Bureau under Section 1031 of the Dodd-Frank Act to take action to
 2 prevent unfair, deceptive or abusive acts or practices has broad policy implications. The
 3 Act also appears to give regulators broad authority to inquire about the consumer's
 4 knowledge of the terms of the loan under the new "abusive" standard. Indeed, Section
 5 1031 contemplates that government intervention occur where a product or service takes
 6 "unreasonable advantage" of "the inability of the consumer" to protect his or her own
 7 interests. This provision is combined with the requirement that loan officers determine that
 8 borrowers have a reasonable ability to repay a loan before making the loan. In addition,
 9 Section 1403 amends TILA to require the Board of Governors to prohibit abusive or unfair
 10 lending practices.
- 11 8. Ban on "Abusive" Acts or Practices. Section 1031 of the Act empowers the Bureau to
 12 prevent a covered institution from engaging in an "unfair, deceptive, or abusive act or
 13 practice in connection with any transaction with a consumer for a consumer financial
 14 product or service, or the offering of a consumer financial product or service." Although
 15 "unfair" and "deceptive" acts or practices have been prohibited for some time under
 16 Section 5 of the Federal Trade Commission Act and similar state laws, the prohibition of
 17 "abusive" acts or practices is new. According to the Act, the Bureau shall have no
 18 authority to declare an act or practice abusive in connection with the provision of a
 19 consumer financial product or service unless the act or practice (i) materially interferes
 20 with a consumer's ability to understand the product or service or (ii) takes unreasonable
 21 advantage of the consumer's lack of understanding, inability to protect his or her interests,
 22 or reasonable reliance on a covered person to act in the interests of the consumer. *Act §*
 23 *1031(d).*
- 24 9. Qualified Mortgages. The Act creates a safe harbor for compliance by defining an
 25 important new category of loans called "qualified mortgages." *Act § 1412.* For example,
 26 creditors and assignees may presume that qualified mortgages satisfy the requirement that
 27 loans be underwritten based on the borrower's ability to repay. The designation of a
 28 qualified mortgage, along with the safe harbor that it provides, is very important because

- 1 borrowers can raise inability to repay underwriting standards as a foreclosure defense
 2 against creditors and assignees, without regard to any statute of limitations. *Act § 1414.*
- 3 10. Compensation Prohibitions and Steering Provisions. Section 1403 of the Act amends the
 4 TILA to prohibit loan originators from paying loan officers or brokers compensation that
 5 varies based on the terms of the loan, other than the amount of the principal. Loan
 6 originators also may not arrange for a consumer to finance any origination fees or costs
 7 except bona fide third-party settlement charges not retained by the creditor or loan
 8 originator. *Act § 1403.* These provisions are intended to prevent lenders from placing
 9 borrowers in loans with rates and fees that are higher than appropriate in light of the
 10 borrowers' qualifications. Additionally, the Act prohibits originators from steering
 11 borrowers from a qualified mortgage to a non-qualified mortgage; to a loan that the
 12 consumer lacks the ability to repay; and to a loan that has "predatory characteristics (such
 13 as equity stripping, excessive fees or abusive terms)." *Act § 1403.* Violation of the ban on
 14 steering incentives can be raised as a foreclosure defense by a borrower against a creditor
 15 or assignee without regard to any statute of limitations. *Act § 1413.*
- 16 11. Ban on Originating Loans Where Borrower Has No "Reasonable Ability" to Repay. One
 17 of the most important provisions of the Act sets forth "minimum standards for residential
 18 mortgage loans," one of which requires mortgage lenders to determine, "based on verified
 19 and documented information," that the consumer has a "reasonable ability to repay the
 20 loan." *Act § 1411.*
- 21 12. Creditors are required to make the ability to pay determination based on the consumer's
 22 credit history, income, obligations, debt-to-income ratio, employment status and other
 23 information, utilizing a fully amortizing payment schedule, and lenders should document
 24 their consideration of these factors. Like the ban on steering incentives, violation of the
 25 ban on considering the borrower's ability to repay for underwriting can be raised as a
 26 foreclosure defense by a borrower against a creditor or assignee without regard to any
 27 statute of limitations. *Act § 1413.*
- 28

II. GENERAL ALLEGATIONS

13. Plaintiffs ANTHONY AND MARIA CARUSO, at all times relevant have been the owners of 21670 Schillingsburg Avenue, San Jose, CA 95120, APN: 708-40-001 and 708-39-004, and the owner of the real property at issue herein. Venue is proper in this Court, as the defendants are subject to litigation within its jurisdiction.
14. Defendant FNB BANCORP, a California Corporation, doing business as FIRST NATIONAL BANK OF NORTHERN CALIFORNIA, a National Banking Association at all times herein mentioned was doing business in the State of California and was the lender for Plaintiff's Deed and Note.
15. Defendant Bank is the lender on the subject property 21670 Schillingsburg Avenue, San Jose, CA 95120, APN: 708-40-001 and 708-39-004.
16. Defendant FIRST AMERICAN TITLE INSURANCE COMPANY, a California Corporation, is the trustee and agent for Defendant Bank.
17. Defendant RANDY BURGIONI is the agent for Defendant Bank, who as Vice-President of Bank was the broker for Bank and acting as its agent during the origination of the loan and at all times herein mentioned, and held himself out to plaintiffs as their financial advisor for real estate within Bank.
18. Plaintiffs are ignorant of the true names and capacities of defendant sued herein as Does 1-10, inclusive, and therefore sues these defendants by such fictitious names and all persons unknown claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud on Plaintiff's title thereto. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.
19. Plaintiffs are informed and believe and thereon allege that, at all times herein mentioned each of the defendants sued herein was the agent and employee of each of the remaining defendants. Plaintiffs allege that each and every defendant alleged herein ratified the conduct of each and every other defendant. Plaintiff further alleges that at all times said defendants were acting within the purpose and scope of such agency and employment.

- 1 20. At all times herein alleged there existed a fiduciary relationship between defendants, and
2 each of them, and Plaintiff, who reposed their entire trust and confidence in defendants,
3 and each of them.
- 4 21. At all times herein alleged, Plaintiffs acted under a legal right or in a good faith belief in
5 the existence of a legal right.
- 6 22. At all times herein alleged Plaintiff acted in good faith and with clean hands in engaging
7 in the acts, conduct or courses of action herein allege.
- 8 23. Plaintiff's conduct at all times relevant hereto was entirely proper, diligent and in good
9 faith.
- 10 24. Defendant's, and each of them, are individually sued as participants and aiders and abettors
11 in the wrongful activities complained of herein, and the liability of each arises from the
12 fact that each has engaged in all or part of the improper acts, plans, schemes or
13 transactions, which operated a fraud against the plaintiff.
- 14 25. Plaintiff was referred to defendant FNB BANCORP, a California Corporation, doing
15 business as FIRST NATIONAL BANK OF NORTHERN CALIFORNIA, a National
16 Banking Association (hereinafter collectively referred to as "Bank") for a loan on White
17 Road, San Jose, California. Whereupon he was introduced to Kathy Castor, a Bank
18 employee with whom plaintiff worked on the White Road property and Schillingsburg
19 construction loan. Once these loans were in place, plaintiff Anthony Caruso was solicited
20 by Bank Vice-President Randy Brugioni. Defendant Brugioni held himself out as a senior
21 financial advisor with such sophistication that as Vice President of Bank, he was routinely
22 consulted by the Board, President Jim Black and Chief Financial Officer because of his
23 financial acumen. Defendant Brugioni represented to Anthony Caruso that he, Brugioni,
24 could and would act as plaintiff's financial advisor for real estate ventures.
- 25 26. Plaintiff was quite satisfied with Ms. Castor's professionalism. Defendant Brugioni
26 insisted he could better serve plaintiff's personal financial goals as his real estate advisor
27 from "the inside." Defendant Brugioni brought a financial "deal" to plaintiffs that would
28 set them up for their children's college and their retirement.

- 1 27. In 2007, defendant Brugioni went to plaintiff with an opportunity to solidify his
2 "children's college education". Defendant Brugioni proposed Bank loan plaintiffs over
3 \$450,000 on the White Road, San Jose commercial property to purchase a commercial
4 property on Santa Clara Street, San Jose. Defendant Brugioni went over with and
5 discussed the proposed investment strategy for the Santa Clara Street commercial property
6 and the investment analysis with White Road, San Jose.
- 7 28. Defendant Brugioni's conduct was quite different than other Bank employees, *i.e.*, Ms.
8 Castor. Not only did Defendant Brugioni bring the "deal" to plaintiff, he analyzed the
9 transactions and provided financial advice about future transactions for plaintiffs. For
10 example, with the White Road, San Jose transaction, plaintiff specifically asked Bank -
11 Brugioni if the financial scheme Brugioni proposed was a sound financial move for
12 plaintiffs' future, particularly their children's college education. In response, defendant
13 Brugioni selected the Santa Clara Street property for the 1031 exchange as the best
14 investment of the three nominated for plaintiffs' "children's future". Plaintiffs went
15 through with defendant Bank - Brugioni scheme to refinance White Road and purchase
16 Santa Clara Street in reliance on Brugioni's analysis and advice.
- 17 29. Prior to Christmas 2008, the construction on Schillingsburg was completed. Upon
18 completion, plaintiff submitted all the final paperwork on Schillingsburg and requested the
19 construction loan be converted to a conventional loan. Defendant Bank, through
20 defendant Brugioni, advised against converting the debt to a conventional loan and stated
21 the terms would be restated until there was a more opportune time in the market.
- 22 30. In 2008/2009, plaintiffs ended up putting the Schillingsburg property up for sale because
23 the economy was in dismal shape. The sale fell through when the Schillingsburg Buyer's
24 bank, Downey Savings, withdrew its loan. During 2008 through 2010 plaintiffs were in
25 constant contact with Bank - Brugioni. Plaintiffs met with Brugioni on at least three
26 occasions from 2008 through 2010 to discuss plaintiffs' real estate investments and
27 finances. Defendant Bank and defendant Brugioni were expressly told that plaintiffs had
28 exhausted their savings and retirement accounts by March 2010.

- 1 31. In April 2010 Bank, through Brugioni, converted the Schillingsburg 2007 construction
2 loan to a conventional loan. In May 2010 plaintiffs had no active income to speak of, and
3 over \$50,000 in monthly mortgages with Schillingsburg, White Road, and Santa Clara
4 Street, but defendant Brugioni told plaintiffs not to worry because he would make
5 “shepherd” the conversion through personally. As a result of defendant Brugioni’s
6 personal attention to shepherding the loan through defendant Bank, plaintiffs were not
7 required to complete a current, up-to-date loan application. Again, plaintiff Anthony
8 Caruso discussed selling the Schillingsburg with defendant Brugioni. Defendant Brugioni
9 advised against selling Schillingsburg in early 2010 and was rather persistent that he
10 “shepherd” their conversion from the 2007 construction loan to a conventional loan even
11 though plaintiffs had little income and had exhausted their savings and retirement
12 accounts, and had no significant assets other than the three properties defendant Brugioni
13 placed approximately \$9 Million of loans.
- 14 32. At no time did defendants assess plaintiffs’ ability to pay based on their credit history,
15 income, obligations, debt-to-income ratio, employment status and other information,
16 utilizing a fully amortizing payment schedule, as required under the Act.
- 17 33. Defendant Brugioni did not require the standard loan information. On or about April 28,
18 2010, Plaintiffs and Defendant Bank purported to execute a Note and Deed of Trust and
19 supporting papers, purported loan number 122724 (“Mortgage”). The purported Mortgage
20 was never provided to plaintiffs. When plaintiffs received their escrow documents they
21 noticed certain documents were absent, but did not consider the matter because defendant
22 Brugioni was shepherding their loan conversion. Defendant Bank failed and/or refused to
23 provide plaintiffs with copies of important documents, including the complete Mortgage,
24 which would explain their consumer rights, as well as other rights, including but not
25 limited to, the right to cancel the contract, 3-Day Notice of Rescission as required under
26 TILA. *See* 15 USC §§ 1601, *et seq.*, including §§ 1635, 1639 and 1640, and the Federal
27 Truth in Lending Disclosures.
- 28

- 1 34. In August 2010 it seemed that plaintiffs' luck had turned. They were back in the
2 construction business with a big job. The job came to an end abruptly on or about
3 September 2011. They started making partial payments on the mortgages hoping things
4 would turn around.
- 5 35. In hopes to keep their home and real estate investments, plaintiffs contacted Bank -
6 Brugioni about the short fall and inquired about the possibility of obtaining a loan
7 modification.
- 8 36. As of September 2011, plaintiffs were, effectively, in the same financial condition as they
9 were in May 2010 when Bank - Brugioni loaned \$2.9 Million on Schillingsburg.
- 10 37. In November 2011, plaintiffs met with Bank-Brugioni. Plaintiffs advised Bank-Brugioni
11 that they were falling behind because of the lost job. They were making partial payments
12 on the approximate \$50,000 in debt service. Bank-Brugioni specifically stated that once
13 the properties were appraised that Bank would work to modify the loans down to 4%, but
14 no final - formal - agreement could be in place before the end of the year, *i.e.*, 2011.
- 15 38. While plaintiffs' father was in the hospital, plaintiffs received notice that Bank filed a
16 lawsuit and demanded a receiver be installed regarding the two commercial properties -
17 White Road, San Jose and Santa Clara Street, San Jose. When confronted by plaintiffs
18 Brugioni said his boss, Jim Black, forced the Receivership.
- 19 39. Thereafter, Bank-Brugioni repeatedly represented to plaintiffs that a modification was
20 available if they would sell one of their commercial properties, also financed by Bank. All
21 three properties were put up for sale. However, plaintiffs are informed and believe and
22 thereon allege that Bank, and its trustees and agents, had no intention of modifying
23 plaintiffs' loan and fraudulently induced us to rely on the proposed modification.
- 24 40. Once one property [Santa Clara Street] was in contract and there was an appearance that
25 Schillingsburg was being marketed aggressively to sell, Bank ordered Notices of Default
26 to be recorded to subvert any possibility of selling the Schillingsburg and the other
27 properties.
28

- 1 41. Schillingsburg was being marketed for \$5.8 Million. After the Notice of Default, no one
2 came near the property. The price was reduced to \$3.9 Million. Bank - Brugioni knew the
3 Notice of Defaults were the "kiss of death" to the sale of our property - he had used that
4 same phrase in 2007 when referring to other properties Bank held notes and deeds of trust
5 on and again in 2009.
- 6 42. Santa Clara Street was finally sold. Bank - Brugioni immediately recanted the offer to
7 modify and stated that \$200,000 additional money was needed to modify the remaining
8 two loans, one being Schillingsburg. Defendants then followed the Notice of Default with
9 a Notice of Trustee's Sale setting a sale date of October 4, 2012.
- 10 43. Plaintiffs' credit score will decrease if their home is sold at trustee's sale. Further, if
11 Plaintiffs' home, Schillingsburg, is sold at trustee's sale, they will forfeit their interest in
12 their property. Plaintiff is willing to reduce the price of their home, and based upon
13 comparable properties in the area could obtain a price higher than the current amount
14 owed - listed by the trustee, First American Title Insurance Company.
- 15 44. Plaintiffs further allege that defendants will claim the loan is in default and has accelerated
16 the Note. However, no modification was offered by the Bank and significant errors have
17 miscalculated the amount of the total debt owed, the monthly payments, and on the face of
18 the Bank's instruments the calculation did not correspond to its own figures. Defendant
19 Bank invalidated the Notice by its own errors, which infer that it has not properly
20 accounted for any of the payments.
- 21 45. A party seeking to foreclose bears the burden of demonstrating standing and must plead its
22 component with specificity, and must demonstrate that it was the holder and owner of the
23 note and Deed of Trust as of the date of foreclosure. As otherwise provided in California
24 Commercial Code Section 3302, a "holder in due course" means the holder of an
25 instrument if: (1) The instrument when issued or negotiated to the holder does not bear
26 such apparent evidence of forgery or alteration or is not otherwise so irregular or
27 incomplete as to call into question its authenticity; and (2) The holder took the instrument:
28 (a) for value; (b) in good faith; (c) without notice that the instrument is overdue or has

1 been dishonored or that there is an uncured default with respect to payment of another
 2 instrument issued as part of the same series; (d) without notice that the instrument contains
 3 an unauthorized signature or has been altered; (e) without notice of any claim to the
 4 instrument described in California Civil Code Section 3306; and (f) without notice that
 5 any party has a defense or claim in recoupment described in subdivision (a) of Section
 6 3305.

7 46. Plaintiffs, maintain, on information and belief that there have been numerous
 8 improprieties in the appointment of Trustees in the handling of their loan, and the alleged
 9 trustee is not properly appointed as foreclosing trustee nor acting in conformity with law.

10 47. Plaintiffs thereby allege that if the threatened foreclosure sale of the subject home occurs it
 11 will be the result of failed notices as only unauthorized parties are available to defendants
 12 and thus it cannot be executed in accordance with the requirements of California Civil
 13 Code § 2924, § 2923.5 and § 2923.6.

14 48. Plaintiff alleges that defendants, and each of them, are engaged in and continue to engage
 15 in violations of California law including but not limited to: California Civil Code § 2924,
 16 § 2923.5 and unless restrained will continue to engage in such misconduct, and that a
 17 public benefit necessitates that Defendants be restrained from such conduct in the future.

18 49. Plaintiffs also seek recovery for damages for non-disclosure of their right to cancel,
 19 non-disclosure of certain Truth in Lending disclosures and Federal violations of numerous
 20 consumer rights.

21 **FIRST CAUSE OF ACTION**
 22 **(UNFAIR TRADE PRACTICES INVOLVING NON-COMPLIANCE, 15 U.S.C. §§ 1601, ET. SEQ.)**

23 50. Plaintiffs reallege paragraphs 1 through 49 as though fully set out and incorporated by
 24 reference herein.

25 51. The Mortgage documents were not given to Plaintiff by defendant Bank and DOES 1-10,
 26 after escrow, and after plaintiffs had purported to sign the documents.

27 52. The above-mentioned constitutes a false representation of the settlement agreement.

28

53. As a direct, proximate, and foreseeable result of Defendants' actions, plaintiffs are subject to loss of property and loss of use of property and other damages.

Wherefore, plaintiffs pray judgment against defendants, and each of them, as more particularly set forth below;

SECOND CAUSE OF ACTION
(MISSING STATEMENTS, 15 U.S.C. §§ 1635, ET. SEQ.)

54. Plaintiffs reallege paragraphs 1 through 53 as though fully set out and incorporated by reference herein.

55. The two required statements under 15 U.S.C. 1639(a) (1) (A) and (B) are completely missing.

56. Defendant Bank and DOES 1-10 also failed and /or refused to meet the disclosure requirements of Section 1635, by not providing the notice/disclosure or filing it before during or immediately after the settlement, as required under this statute.

57. As a direct, proximate, and foreseeable result of the failure to provide proper notice, plaintiffs are subject to loss of property and loss of use of property and other damages.

Wherefore, plaintiffs pray judgment against defendants, and each of them, as more particularly set forth below;

THIRD CAUSE OF ACTION
(MISSING DISCLOSURE STATEMENTS, 15 U.S.C. §§ 1638, ET. SEQ.)

58. Plaintiffs reallege paragraphs 1 through 57 as though fully set out and incorporated by reference herein.

59. The required disclosure statements are completely missing under 15 USC 1638(a)(2)(B) (a)(9), (a)(11) and (a)(12) and Regulation Z, Part 226.17 et seq.

60. Defendant Bank and DOES 1-10 failed and /or refused to meet the disclosure requirements of Section 1638, by not providing the disclosure or causing its filing before during or immediately after the settlement, as required under this statute.

61. As a direct, proximate, and foreseeable result of the failure to provide proper notice, plaintiffs are subject to loss of property and loss of use of property and other damages.

1 Wherefore, plaintiffs pray judgment against defendants, and each of them, as more
2 particularly set forth below;

3 **FOURTH CAUSE OF ACTION**
4 **(DISCLOSURE VIOLATIONS, PURSUANT TO TITLE 12 CODE OF FEDERAL**
5 **REGULATIONS SECTION 226, ET. SEQ.)**

6 62. Plaintiffs reallege paragraphs 1 through 61 as though fully set out and incorporated by
7 reference herein.

8 63. The Federal Reserve Board Interpretation, Title 12 Code of Federal Regulations Part 226,
9 Supplement I, Paragraph 23(a)(1), provides that in the present case the transaction is
10 rescindable for reasons above and below stated.

11 64. The disclosures made in relation to the consumer credit transaction were not presented in
12 the manner required by law. Furthermore, the disclosures were not grouped together and
13 were not segregated from everything else as required by Title 12 Code of Federal
14 Regulations, Section 226.17(a)(1) and in this case were not given at all.

15 65. As a direct, proximate, and foreseeable result of the failure to provide proper notice,
16 plaintiffs are subject to loss of property and loss of use of property and other damages.

17 Wherefore, plaintiffs pray judgment against defendants, and each of them, as more
18 particularly set forth below;

19 **FIFTH CAUSE OF ACTION**
20 **(RIGHT TO RESCIND VIOLATIONS, PURSUANT TO TITLE 12 CODE OF FEDERAL**
21 **REGULATIONS SECTION 226, ET. SEQ.)**

22 66. Plaintiffs reallege paragraphs 1 through 65 as though fully set out and incorporated by
23 reference herein.

24 67. The right to rescind or cancel settlement document was not disclosed or given, as required
25 by Title 12 Code of Federal Regulation, Section 226.18 et seq.

26 68. As a direct, proximate, and foreseeable result of the failure to provide proper notice,
27 plaintiffs are subject to loss of property and loss of use of property and other damages.

28 Wherefore, plaintiffs pray judgment against defendants, and each of them, as more
particularly set forth below;

**SIXTH CAUSE OF ACTION
(RIGHT TO CANCEL VIOLATIONS, PURSUANT TO TITLE 12 CODE OF FEDERAL
REGULATIONS SECTION 226, ET. SEQ.)**

69. Plaintiffs reallege paragraphs 1 through 68 as though fully set out and incorporated by reference herein.
70. There was no separate form to cancel, as required by Title 12 Code of Federal Regulation, Section 226 et seq.
71. As a direct, proximate, and foreseeable result of the failure to provide proper notice, plaintiffs are subject to loss of property and loss of use of property and other damages.
- Wherefore, plaintiffs pray judgment against defendants, and each of them, as more particularly set forth below;

**SEVENTH CAUSE OF ACTION
(DISCLOSURE VIOLATIONS, PURSUANT TO TITLE 15 U.S.C. SECTION 1601, ET. SEQ. AND
REGULATION Z)**

72. Plaintiffs reallege paragraphs 1 through 71 as though fully set out and incorporated by reference herein.
73. Since this action was commenced, Defendant Bank and DOES 1-10 have continued and so continue to violate the Consumer Credit Protection Act, Title 15 United States Code, Section 1601 et seq., and Regulation Z, Title 12 Code of Federal Regulations, Part 226, which was adopted pursuant to such Act, by failing to properly make the disclosures required by the Act and Regulation Z, as herein after more particularly set forth.
74. As a direct, proximate, and foreseeable result of the failure to provide proper notice, plaintiffs are subject to loss of property and loss of use of property and other damages.
- Wherefore, plaintiffs pray judgment against defendants, and each of them, as more particularly set forth below;

**EIGHTH CAUSE OF ACTION
(FAILURE TO PROVIDE COPIES OF MORTGAGE, IN VIOLATION OF 15 USC SECTION
1601, ET. SEQ.)**

75. Plaintiffs reallege paragraphs 1 through 74 as though fully set out and incorporated by reference herein.

1 76. Defendant Bank and DOES 1-10 failed to give to plaintiffs signed copies of the complete
 2 Mortgage package as required by 15 U.S.C. §§ 1601 et seq. within a reasonable amount of
 3 time or never during the entire period of the Loan Agreement.

4 77. As a direct, proximate, and foreseeable result of the failure to provide proper notice,
 5 plaintiffs are subject to loss of property and loss of use of property and other damages.

6 Wherefore, plaintiffs pray judgment against defendants, and each of them, as more
 7 particularly set forth below;

8 **NINTH CAUSE OF ACTION**
 9 **(FAILURE TO GIVE 3 DAY COOLING PERIOD, IN VIOLATION OF 15 USC SECTION 1601,**
ET. SEQ. AND REGULATION Z)

10 78. Plaintiffs reallege paragraphs 1 through 77 as though fully set out and incorporated by
 11 reference herein.

12 79. Defendant Bank and DOES 1-10 failed to give to plaintiffs the required 3 day cooling off
 13 period, as required by Regulation Z and 15 U.S.C. §§ 1601 et seq.

14 80. As a direct, proximate, and foreseeable result of the failure to provide proper notice,
 15 plaintiffs are subject to loss of property and loss of use of property and other damages.

16 Wherefore, plaintiffs pray judgment against defendants, and each of them, as more
 17 particularly set forth below;

18 **TENTH CAUSE OF ACTION**
 19 **(FAILURE TO GIVE CONSPICUOUS WRITINGS, IN VIOLATION OF 15 USC SECTION 1601,**
ET. SEQ. AND TITLE 12 CODE OF FEDERAL REGULATIONS, SECTION 226.18)

20 81. Plaintiffs reallege paragraphs 1 through 80 as though fully set out and incorporated by
 21 reference herein.

22 82. By reason of the foregoing, Defendant Bank and DOES 1-10 have failed to make the
 23 disclosures required by 15 U.S.C. §§1601 et seq. and Title 12 Code of Federal
 24 Regulations, Section 226.18, clearly and conspicuously in writing, in a form that
 25 Defendants could keep as required by 15 U.S.C. §§1601 et seq. and Title 12, Code of
 26 Federal Regulations, Section 226.18. As a proximate result of the foregoing, the Plaintiffs
 27 have the right to rescind the entire transaction.

28

1 83. As a direct, proximate, and foreseeable result of the failure to provide proper notice,
2 plaintiffs are subject to loss of property and loss of use of property and other damages.
3 Wherefore, plaintiffs pray judgment against defendants, and each of them, as more
4 particularly set forth below;

5 **ELEVENTH CAUSE OF ACTION**
6 **(INJUNCTIVE RELIEF - TRO and Preliminary Injunction)**

7 84. Plaintiffs reallege paragraphs 1 through 83 as though fully set out and incorporated by
8 reference herein.

9 85. Plaintiffs have been and will be seriously injured unless Defendant Bank's foreclosure and
10 other activities complained of are temporarily restrained and preliminarily and
11 permanently enjoined. Plaintiffs will suffer irreparable injury of a continuing nature that
12 cannot be adequately calculated or compensated in money damages, in that plaintiffs will
13 lose their home, a unique property.

14 86. Plaintiffs further seek an injunction to enjoin defendants from keeping relevant documents
15 such as, complete loan package, but not limited thereto, and to forward all relevant
16 foreclosure documents to plaintiffs.

17 Wherefore, plaintiffs pray judgment against defendants, and each of them, as more
18 particularly set forth below;

19 **TWELFTH CAUSE OF ACTION**
20 **(CONSTRUCTIVE FRAUD - BREACH OF FIDUCIARY DUTY)**

21 87. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 86 as though fully set
22 forth herein.

23 88. Plaintiffs obtained several loans through defendant Bank, including a construction loan on
24 their home (Schillingsburg) that was re-stated on multiple occasion sand then converted
25 into a conventional loan.

26 89. Defendants Bank and Brugioni and DOES 1-10, and each of them, by and through their
27 conduct, including, but not limited to, (a) their acts and omissions to act, and (b) their
28

1 representations and concealment of facts, created a duty to plaintiffs and owed a duty to
2 plaintiffs based thereon.

3 90. Defendant Bank, by and through its agent and employee, Defendant Brugioni, acted
4 outside the scope of a traditional lender. Defendant Bank, by and through its agent and
5 employee, Defendant Brugioni, represented itself as and held itself out as plaintiffs'
6 financial advisor. Not only did Brugioni identify, recommend and facilitate (1) investment
7 strategies, and (2) real property purchases for plaintiffs, he directed and/or completed the
8 loan documentation required for underwriting and appraisals.

9 91. As more particularly set forth above, Defendants Bank and Brugioni actively solicited
10 plaintiffs. Defendants Bank and Brugioni pro-actively gave investment advice and
11 investment analysis, contrary to a mere lender of money as Bank had previously conducted
12 itself in 2006, prior to Brugioni active solicitation of plaintiffs.

13 92. Defendants conduct was intended to create, and in fact did create, a relationship of
14 confidence and trust with plaintiffs. Plaintiffs reposed trust and confidence in defendants,
15 as was defendants' intent evidenced by defendants conduct. As such, defendants were
16 required to use utmost care, skill, and diligence in the performance of defendants duties
17 and obligations as financial advisor to plaintiffs, including, but not limited to, making the
18 ability to pay determination based on the plaintiffs' credit history, income, obligations,
19 debt-to-income ratio, employment status and other information, utilizing a fully
20 amortizing payment schedule.

21 93. Despite having voluntarily accepted the trust and confidence of plaintiffs with regard to
22 real estate investments intended to finance the college educations for plaintiffs' children
23 and plaintiffs' retirement, and in violation of this relationship of trust and confidence,
24 defendants abused the trust and confidence of plaintiffs by failing to disclose plaintiffs'
25 inability to re-pay the loans held by Defendant Bank.

26 94. The terms of the Mortgage which were pre-printed documents that Defendants presented
27 to Plaintiff for final signature with no opportunity to negotiate their terms, are so one sided
28 as to be abusive and unconscionable. Defendants exploited their superior bargaining

1 power to induce Plaintiffs to executed a mortgage loan and enter into a highly
2 disadvantageous loan. Said procedural and substantive unconscionability renders the
3 Deed of Trust void and unenforceable.

- 4 95. Plaintiffs further allege that Defendants, and each of them, had a duty and obligation to
5 represent accurately, truthfully, and completely disclose all the information that Plaintiffs
6 relied upon in performing their investigation, consideration, and evaluation of whether to
7 obtain additional mortgage financing, alternative mortgage financing and/or selection of
8 refinancing for the subject property. Defendants breached their duty and obligation to
9 provide accurate, truthful and complete information by failing to provide the necessary
10 information to Plaintiff in a manner that he would understand, considering the latter's
11 limited access to information, and they failed to provide the information necessary for
12 Plaintiff to make a complete accurate and thoughtful decision on these financial issues, all
13 of which caused them damage. Plaintiff relied upon the misrepresentation of Defendants
14 in forming his decision regarding the loan transaction at issue. Under California Civil
15 Code which states that a person who, with intent to defraud a participant in mortgage
16 lending transaction; (a) knowingly makes a false statement or misrepresentation made by
17 another person concerning a material fact deliberately conceals or fails to disclose a
18 material fact, (b) knowingly uses or facilitates the use of a false statement or
19 misrepresentation made by another person concerning a material fact or deliberately uses
20 or facilitates the use of another person's concealment or failure to disclose a material fact.
21 (c) Receives any proceeds or any other money in connection with a mortgage lending
22 transaction that the person knows resulted from a violation of par. (a) or (b). (d) Conspires
23 with another person to violate any provision of par. (a)(b) or (c) files or causes to be filed
24 with a County Recorder any document that the person knows to include a misstatement,
25 misrepresentation or omission concerning a material fact.
- 26 96. Plaintiffs further allege that Defendants, and each of them, falsely misrepresented that the
27 Notice of Default was validly executed, that they intended to induce plaintiffs into relying
28 on the misrepresentation, that they knew at the time they made these representation to

1 Plaintiffs that they were untrue, and defendants know at the time that they were attempting
 2 to foreclose on Plaintiffs' Trust Deed and notes that they had no right to do so.

3 97. In connection with the application for and consummation of the mortgage loan the subject
 4 of this action, Defendants agreed, between and among themselves, to engage in actions
 5 and a course of conduct designed to further an illegal act or accomplish a legal act by
 6 unlawful means, and to commit one or more overt acts in furtherance of the conspiracy to
 7 defraud the Plaintiffs.

8 98. Defendants, and each of them, agreed between and among themselves to engage in the
 9 conspiracy to defraud for the common purpose of accruing economic gains for themselves
 10 at the expense of and detriment to the Plaintiffs.

11 99. As a direct, proximate, and foreseeable result of the failure to provide proper notice,
 12 plaintiffs are subject to loss of property and loss of use of property and other damages.

13 100. Defendants conduct as set forth above was intentional, oppressive, fraudulent and
 14 malicious so as to justify an award of punitive damages in an amount sufficient that such
 15 conduct will not be repeated.

16 Wherefore, plaintiffs pray judgment against defendants, and each of them, as more
 17 particularly set forth below;

18 **THIRTEENTH CAUSE OF ACTION**
 19 **(NEGLIGENCE)**

20 101. Plaintiffs reallege paragraphs 1 through 100 as though fully set out and incorporated by
 21 reference herein.

22 102. Defendants Bank, Brugioni and DOES 1-10 had a duty to exercise due care in making
 23 recommending and facilitating loans to plaintiffs to insure plaintiffs had the ability to
 24 repay the loans, among other duties created by defendants' affirmative conduct.

25 103. Defendants, and each of them, had a duty and obligation to represent accurately, truthfully,
 26 and completely all the information that Plaintiff relied upon in performing their
 27 investigation, consideration, and evaluation of whether to obtain additional mortgage
 28 financing, alternate mortgage financing, and / or selection of refinancing for the subject

property. Defendants breached their duty and obligation to provide accurate, truthful and complete information by failing to provide the information to Plaintiff in a manner that he would have understood and they failed to provide all the information necessary for Plaintiffs to make a complete accurate and well thought decision on these financial matter, all which caused them damage.

104. Plaintiffs relied upon the representations of the Defendants informing their decision regarding loan transactions.

Wherefore, plaintiffs pray judgment against defendants, and each of them, as more particularly set forth below;

**FOURTEENTH CAUSE OF ACTION
(QUIET TITLE)**

105. Plaintiffs reallege paragraphs 1 through 100 as though fully set out and incorporated by reference herein.

106. The purpose of quiet title is to establish title against adverse claims to real property or any interest in the Real Property (Code of Civil Procedure of California 760.020).

107. The basis of PlaintiffS interest in title is a Deed of Trust from Defendants, granting the Subject Property to Plaintiff, and recorded in the Official Records of the County of Santa Clara.

108. Plaintiffs are seeking to quiet title against the claims of Defendants Bank, First American Title Insurance Company and DOES 1-10.

109. Plaintiff s therefore seek a judicial declaration that the title to the subject property is vested in Plaintiffs alone and the Defendants, and each of them, be forever enjoined from asserting any estate, right, title, or inters tint he Subject property, adverse to the Plaintiffs herein, or, alternatively, the Mortgage is void.

Wherefore, plaintiffs pray judgment against defendants, and each of them, as more particularly set forth below;

**FIFTEENTH CAUSE OF ACTION
(VIOLATION OF CALIFORNIA CIVIL CODE § 1572)**

110. Plaintiffs reallege paragraphs 1 through 100 as though fully set out and incorporated by reference herein as though fully set forth herein against each and every defendant.
111. Although Plaintiffs were successful General Contractors, plaintiffs reasonably relied upon Defendants which was reasonable and consistent with the Congressional intent and purpose of California Civil Code § 1572 enacted in 1872 and designed to assist and protect consumers similarly situated as Plaintiffs in this action.
112. Defendants misrepresentations and failures to disclose, as described above were made with the intent to induce Plaintiffs to obligate themselves in reliance on the integrity of Defendants.
113. Plaintiffs could not have discovered the true nature of the material facts on their own. Defendants failed to inform Plaintiff that based solely on a stated income, credit rating, and the ration of assets and liabilities that they could not and would not qualify for the subject loan. Plaintiff's income was never truly verified so much so that in this context, it made the latter believe that their income was sufficient to repay the loan. A determination of whether Plaintiff would be able to make the payments as specified in the loan documents was never truly made, and the required credit investigation apparently was not conducted.
114. Plaintiffs were ignorant of the facts which Defendants misrepresented and failed to disclose and their reliance was a substantial factor in causing their harm. Plaintiff was not informed adequately about the full terms and/or possible consequences of their loan agreement. Plaintiff was not informed of the following but not limited to: the risks and advantages of the loan; or the inflated valuation of the property.
115. Plaintiff s alleges that Defendants Bank, Brugioni and DOES 1-10 had a duty to disclose to Plaintiffs that they could not qualify for the subject loan, but instead failed to disclose this information to Plaintiffs. Defendants failed to make such disclosure while knowing they would foreclose on the Properties if, or when, Plaintiffs defaulted on the loans.

116. Plaintiffs allege that Defendants had exclusive knowledge of the material fact that Plaintiff should not have qualified for the loan with monthly payments that would, and did, outstrip Plaintiff's financial ability to generate revenue. Had the real fact been known, Plaintiff would not have obligated themselves to a loan that they could not realistically afford.

117. As a proximate result of Defendants, Plaintiff's have suffered damage in an amount to be determined at trial.

118. The conduct of Defendants as mentioned above was fraudulent within the meaning of California Civil Code § 3294(c)(3), and by virtue thereof Plaintiff is entitled to an award of punitive damages in an amount sufficient to punish and make an example of the Defendants.

Wherefore, plaintiffs pray judgment against defendants, and each of them, as more particularly set forth below;

**SIXTEENTH CAUSE OF ACTION
(VIOLATION OF CALIFORNIA CIVIL CODE § 2923.5)**

119. Plaintiffs reallege paragraphs 1 through 100 as though fully set out and incorporated by reference herein as though fully set forth herein against each and every defendant.

120. Defendants cannot maintain any action for possession, nor the threatened non-judicial foreclosure proceeding which it commenced because defendants cannot strictly comply with tenets of California Civil Code § 2923.5 and § 2924.

121. This State's legislature enacted SB 1134-1137 in an effort to impact residential mortgage lenders, foreclosure procedures and eviction procedures, and it amends provisions of the foreclosure procedures found in California Code of Civil Procedure § 2924, by adding requirements for meetings, due diligence, and notification of counseling. This change imposes an unprecedented duty on lenders relating to contact with borrowers.

California Civil Code § 2923.5

122. As of yet, California Civil Code § 2923.5 applies to loans made from January 1, 2003 to December 31, 2007, and loans secured by residential real property that are for owner occupied residences. For purposes of California Civil Code § 2923.5, "owner occupied"

1 means that the residence is the principal residence of the borrower, as is the case at bar.
 2 Prior to filing a Notice of Default, California Civil Code § 2923.5 provides in pertinent
 3 part:

4 (a)(1) a trustee may not file a notice of default pursuant to Section 2924 until 30
 5 days after contact is made as required by paragraph (2) or 30 days after satisfying
 6 the due diligence requirements as described in subdivision (g). In either case, the
 7 borrower shall be provided the toll free telephone number made available by the
 8 United States Department of Housing and Urban development (HUD) to find a
 9 HUD-certified housing counseling agency. Any meeting may occur telephonically.

10 (2) An authorized agent shall contact the borrower in person or by telephone in
 11 order to assess the borrower's financial situation and explore options for the
 12 borrower to avoid foreclosure. During the initial contact, the mortgagee,
 13 beneficiary, or authorized agent shall advise the borrower to avoid foreclosure.
 14 During the initial contact, the mortgagee, beneficiary, or authorized agent shall
 15 advise the borrower that he or she has the right to request a subsequent meeting
 16 and, if requested, the mortgagee, beneficiary, or authorized agent shall schedule the
 17 meeting to occur within 14 days.

18 123. The purpose of assessing the financial situation of a homeowner was turned into a
 19 mockery by the miscalculated financials of the homeowner after the homeowner expressly
 20 raised their concerns and then was not given any options in order to avoid foreclosure.

21 124. Defendant in failing to confer with Plaintiffs herein, as owner of record of the subject
 22 property, and further, in failing to provide Plaintiff with notice of the current condition of
 23 title, did violate portions of the following provisions of the California Civil Code, Sections
 24 2923.5; 2923.52; 2923.54; 2924(b). As a result of such breach by Defendants, and each of
 25 them, Plaintiff has suffered damages.

26 125. Plaintiff is informed and believes and thereon alleges that the Notice, and the threat of
 27 future notices and foreclosure are invalid and unenforceable due to the intentional and
 28

- 1 willful violations including but not limited to, failing and/or refusing to mail
2 correspondences with proper calculations to plaintiffs as requested.
- 3 126. Defendants did not fully comply with California Civil Code § 2923.5, given the active
4 stance the homeowner has undertaken to secure a proper calculation of their mortgage and
5 therefore any potential Notice of Default is VOID. Thus if the property is sold in a
6 nonjudicial foreclosure, the procedure is also void.
- 7 127. At all times herein alleged there existed a fiduciary relationship between defendants, and
8 each of them, and Plaintiff, who reposed their entire trust and confidence in defendants,
9 and each of them.
- 10 128. Plaintiffs were the purchasers of the subject property to all terms and conditions contained
11 in the Promissory Note and Deed of Trust executed by them. Defendants implied contract
12 with Plaintiff to ensure that Plaintiffs understood all fees, which would be paid to the
13 Defendants to obtain credit on Plaintiff's behalf and to not charge any fees which were not
14 related to the settlement of the loan and without full disclosure to Plaintiffs.
- 15 129. Plaintiff performed all required acts under the various agreements with Defendants, and
16 each of them, except for those acts which the Defendants prevented them from
17 accomplishing. Defendants cannot, in good conscious and equity, retain the benefits from
18 their actions of charging fees, rebates, kickbacks (including but not limited to profits from
19 sale of mortgages and notes using Plaintiffs' identity, credit score and reputation without
20 consent, right, justification or excuse as part of an illegal enterprise scheme) and gains and
21 fees unrelated to the settlement of services provided.
- 22 130. Defendants, and each of them, breached the terms of the said agreement by their conduct,
23 as aforesaid, to the detriment of the Plaintiffs herein.
- 24 131. As a direct and proximate result of the actions of Defendants, and each of them Plaintiff
25 has suffered damages, including cost and attorneys fees, in an amount which is not
26 currently known but subject to proof at the time of trial.
- 27
28

- 1 132. Defendants, and each of them, failed to exercise good faith in the performance of the
2 obligations, including but not limited to, their failure to perform their duties and
3 obligations.
- 4 133. Defendants and each of them sought to take unfair advantage of their special relationship
5 with Plaintiff through misfeasance, misrepresentation, and/or fraud. Such acts by
6 defendants were willful, wanton, malicious, and oppressive and were undertaken with an
7 intent to injure Plaintiffs and justify the awards sought under this complaint.
- 8 134. Defendants have been unjustly enriched at the expense of Plaintiff, and the maintenance of
9 the enrichment would be contrary to the rules and principles of equity.
- 10 135. Defendant at all times herein allege was a fiduciary of Plaintiff in that Plaintiff reposed
11 their entire confidence and trust in Defendant.
- 12 136. The Plaintiff was justified in believing that the defendant would take no unwarranted
13 action that would compromise and/ or jeopardize the right of the Plaintiff.
- 14 137. Plaintiff alleges that Defendant, in performing and omitting to perform the acts herein
15 alleged, breached the fiduciary duty owed by it to Plaintiff by failing to perform its duties,
16 and in the acts hereinbefore complained of.
- 17 138. Defendant did such acts by violating the fiduciary duty owed to Plaintiff, violating the
18 aforesaid Civil Code, and did so strictly for the benefit to said Defendant, and to the
19 detriment of Plaintiff.
- 20 139. That as a direct and proximate result of the breach of the fiduciary agreement, there is
21 currently due from Defendants, and each of them, to this Plaintiff, a balance which is
22 presently unknown, and can only be ascertained by an accounting.
- 23 140. Defendants are experienced business entities that sought to profit from the disparity in
24 bargaining power between themselves and Plaintiff. Defendants took advantage of this
25 disparity by deliberately providing Plaintiff with misinformation about the subject loan.
- 26 141. Defendants, and each of them, have wrongfully diverted money and attempt to divert the
27 property of Plaintiff for personal profit and gain, and in derogation of the future rights and
28 interest of the plaintiff.

1 142. Defendants, and each of them sought to gain unfair advantage over Plaintiff in doing the
 2 act herein complained of, and in so doing said acts as aforesaid, breached the covenant of
 3 good faith and fair dealing implicit in every contract made and entered into in the State of
 4 California.

5 143. Plaintiff seeks judicial imposition of a constructive trust on the assets wrongfully
 6 misappropriated by Defendants, and each of them, and that it be required to account for all
 7 such assets received, and further disgorge said assets.

8 Wherefore, plaintiffs pray judgment against defendants, and each of them, as more
 9 particularly set forth below;

10 SIXTEENTH CAUSE OF ACTION
 11 (DECLARATORY RELIEF)

12 144. Plaintiffs reallege paragraphs 1 through 100 as though fully set out and incorporated by
 13 reference herein as though fully set forth herein against each and every defendant.

14 145. Plaintiff alleges that an actual controversy exists as to the following issues:

- 15 a. Plaintiffs contend that the Mortgage - Note and Deed of Trust on the
 16 Schillingsburg property is void and subject to rescission, or, minimally, invalid,
 17 based upon defendants failure to comply with the law and other regulatory statutes
 18 requiring representation of disclosure requirements, and other statutory provisions
 19 described herein above. However, defendants contend that Bank has the right to
 20 pursue its remedies under the Note and Deed of Trust.
- 21 b. Plaintiff contends that defendants failed to provide Plaintiffs with full disclosure of
 22 the terms of the loan pursuant to statutory provision alleged in this Complaint, and
 23 as such the entire loan finance transaction is subject to rescission. However,
 24 Defendants contend that full disclosure was made to plaintiff, and the terms of the
 25 loan agreement are valid and in full legal force; and
- 26 c. Plaintiff contend that Defendants sold a loan to Plaintiffs for which they were not
 27 qualified based upon their actual income, credit history, and debt asset ratio, and as
 28 such the entire loan and Note must be rescinded. However, defendants contend

1 that Plaintiffs were qualified for the loan and they are still responsible for
 2 payments under the Note.

3 146. Plaintiff desires judicial determination of their rights and duties, and a declaration as to the
 4 validity for the finance loan agreement, financed loan transaction, and Defendants right to
 5 proceed with remedies to foreclose on the note, inclusive of a non-judicial foreclosure of
 6 the subject property.

7 147. Plaintiff alleges that a judicial declaration is necessary and appropriate at this time under
 8 the circumstances in order that Plaintiff may ascertain their rights under the Note and as to
 9 Defendants' right to proceed with its remedies, inclusive of the non-judicial foreclosure of
 10 the subject property.

11 148. Plaintiff alleges that Defendants actions have undermined their rights to the Subject
 12 Property, Schillingsburg, and have interfered, and continue to interfere with Plaintiffs
 13 right of possession as the owner of the Subject Property, Schillingsburg.

14 149. By the actions above and set forth herein, Plaintiff has a strong likelihood of prevailing on
 15 the merits of the case. Plaintiff request that this court grant a Preliminary Injunction and
 16 Temporary Restraining Order and injunctive relief under CCP § 527 and Cal. Rules of
 17 Court § 3.1150, first as to any action to set the subject property for a non-judicial sale
 18 pursuant to foreclosure proceedings, and secondary a permanent injunction precluding
 19 defendants from engaging in the wrongful conduct herein in the future.

20 Wherefore, plaintiffs pray judgment against defendants, and each of them, as more
 21 particularly set forth below;

22 PRAYER

23 WHEREFORE, plaintiffs having set forth the claims for relief against defendants,
 24 respectfully pray that this Court grant the following relief against them as follows:

- 25 1. Actual economic and non-economic damages;
- 26 2. For a declaration of the rights and duties of the parties relative to the Plaintiffs' home
- 27 to determine the actual status and validity of the loan, Deed of Trust, and Notice of Default;

1 3. For a temporary restraining order enjoining all Defendants, their agents, assigns, and all
2 person acting under, or in concert with them, from foreclosing on Plaintiffs homeowner from
3 conducting a trustees sale or causing a trustees sale to be conducted relative to Plaintiffs home
4 immediately;

5 4. For a preliminary injunction and permanent injunction enjoining all Defendants, their
6 agents, assigns, and all person acting under, or in concert with them, from foreclosing on
7 Plaintiffs homeowner from conducting a trustees sale or causing a trustees sale to be conducted
8 relative to Plaintiffs home;

9 5. Rescission of the entire Mortgage and note amounting to clear title to property with
10 fixtures as a result of the aforementioned;

11 6. As a result of the aforesaid violations, Defendants are liable to Plaintiffs in an amount
12 not less than \$200.00 and up to \$2000.00, for each and every violation, and

13 7. Damages as a result of the aforementioned violations, to be fixed and awarded by the
14 Court, and

15 8. Damages for the Unfair and Deceptive Acts and Practices in the amount of \$4000.00
16 for each and every violation, and

17 9. Damages in the amount of three times the interest paid and clear title to the property
18 stemming from the usurious interest, and

19 10. Judgment against Plaintiff for return of the down payment, and other payments, as
20 well as interest on the above amount, and

21 11. Cost of litigation as provided in Title 15 United States Code, Section 1601 et. seq.;

22 12. Cancellation of the sale and restitution of the home to Plaintiffs;

23 13. For an Order enjoining Defendants from continuing to violate the statutes alleged
24 herein;

25 14. For an Order, requiring Defendants to reinstate Plaintiff on title to their Property, and
26 or restraining Order preventing Defendants and its agents, employees, officers, attorneys, and
27 representatives from engaging in or performing any of the following acts: (i) offering, or
28

1 advertising this property for sale and (ii) attempting to transfer title to this property and or (iii)
2 holding any auction therefore;

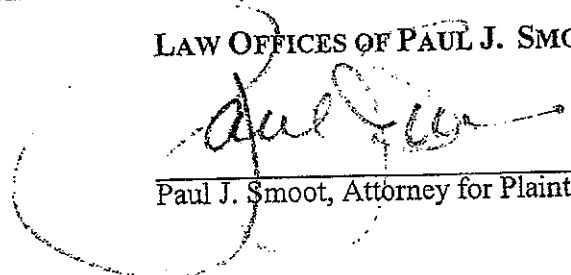
3 15. For punitive damages;

4 16. Cost and reasonable attorney's fees pursuant to California Civil Code § 1717, §
5 1788.30(b), § 1788.30(c);

6 17. For such other and further relief as the court may deem just and proper.

7 Dated: October 2, 2012

LAW OFFICES OF PAUL J. SMOOT


Paul J. Smoot, Attorney for Plaintiffs